VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC LIST VCAT REFERENCE NO. D42/2009

CATCHWORDS

Agreement in principle – terms of settlement – whether proceeding has settled - amended terms of settlement not exchanged – reinstatement of proceeding

APPLICANT	High Porch Constructions Pty Ltd (ACN 126 817 990)
RESPONDENTS	Amjad Al-Khatib, Jamileh Muti
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Reinstatement hearing
DATE OF HEARING	16 February, 18 March and 28 April 2010
DATE OF ORDER	28 May 2010
CITATION	High Porch Constructions Pty Ltd v Al-Khatib & Anor (Domestic Building) [2010] VCAT 1052

ORDER

1. The proceeding is reinstated.

2. **I direct the principal registrar to remove from the file and return to the applicant exhibit 'OPE-25' to the affidavit of Omar Peter El-Hissi affirmed 17 March 2010 being a letter from Russell Kennedy to Noh Legal dated 11 February 2010 (the affidavit is documents 69and 64 in the tribunal file marked with a purple flag).**

3. By 28 June 2010 the respondent must pay the sum of $57,000 into the Domestic Builders Fund pursuant to s53(2)(bb) of the *Domestic Building Contracts Act* 1995, such sum to be held until further order of the Tribunal.

4. Payment of such sum must be in cash or by way of bank cheque or money order payable to the Victorian Civil and Administrative Tribunal, directed to the attention of the principal registrar and must be accompanied by a copy of this Order.

5. Upon receiving a written request signed by both parties, Consent Orders may be made in Chambers for payment out of the Domestic Builders Fund of the deposited amount.

6. **The proceeding is set down for hearing on 20 July 2010 at 10:00 AM at 55 King Street Melbourne before any member but not before Deputy President Aird to consider the respondents' application for damages for the failure of the applicant to provide them with warranty cards or invoices for all appliances.**

8. Costs reserved with liberty to apply. Any such application should be listed for hearing before Deputy President Aird after the hearing and determination of the respondents' application for damages referred to in order 6.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicant	Mr D Cole of Counsel
For Respondents	Ms S Mitchell, solicitor on 16 February and 18 March 2010 and Dr M Sharpe of Counsel on 28 April 2010

REASONS

1 The respondent owners engaged the applicant builder in November 2007 to construct three units in Dandenong. Disputes arose during the project and on 31 December 2008 the owners took possession without paying the builder's final invoice. The builder commenced these proceedings on 29 January 2009 seeking payment of its final invoice of $88,342.40 plus interest and costs. It seems they reached an in principle agreement to settle their disputes on at least two occasions; first on 3 July 2009 when they had an informal mediation conducted by a member of the same ethnic community as the owners and the director of the builder, and secondly, at a compulsory conference on 19 August 2009.

2 Although terms of settlement were prepared by the builder's lawyers following the informal mediation, these were not signed by the owners. The parties applied by consent for the proceeding to be referred to the compulsory conference. The lawyers for both parties have filed affidavits in which they depose to an in principle agreement having been reached at the compulsory conference, but terms of settlement not being prepared because of the lateness of the hour. The seeming inability of the parties to commit to a final settlement of their disputes, clearly demonstrates the desirability of terms of settlement being signed at a mediation or compulsory conference.

3 Terms of settlement were prepared by the builder's lawyers – NOH Legal ('NOH') following the compulsory conference. On 1 Septemer 2009 the owners' lawyers – Russell Kennedy ('RK') wrote to the tribunal requesting a directions hearing which was listed for 8 October 2009.

4 On 7 October 2009 the builder filed an affidavit by Omar Peter El-Hissi of NOH deposing to the history of the dispute and the refusal of the owners to sign the Terms. He exhibited copies of correspondence between NOH and RK following the compulsory conference. This affidavit was filed in support of an application for costs to be made at the directions hearing for the builder's costs, of the compulsory conference and of the directions hearing, on the grounds that the owners' refusal to sign the terms was an abuse of process.

5 At the directions hearing on 8 October 2009 the owners filed an affidavit of Suzanne Mitchell of RK, the solicitor acting on behalf of the owners in the absence of Demetra Giannakopolous, the solicitor responsible for the file. Ms Mitchell deposed to communications with Mr El-Hissi following the compulsory conference, and confirmed that the owners were now prepared to sign the Terms. At the commencement of the directions hearing Ms Mitchell advised the owners had signed the Terms. I stood the matter down to enable Mr Cole, counsel for the builder to make enquiries as to whether the builder would now sign the Terms. After he confirmed his instructions were that the director would sign the Terms, I made the following orders:

> The respondents having signed terms of settlement and counsel for the applicant having indicated he understands a director of the applicant will also sign the terms, the Tribunal orders:
>
> 1. This proceeding is referred to an administrative mention on 15 October 2009 at which time if the parties have not confirmed settlement has been finalised it shall be listed for a directions hearing.
> 2. There is no order as to costs with liberty reserved to the parties to apply for costs of the proceeding in the event settlement is not achieved, including the costs the subject of the applicant's application set out in the letter of its solicitor dated 7 October 2009 and the supporting affidavit.

6 On 16 October 2009 the parties' lawyers separately advised the tribunal that the proceeding had not resolved and requested a directions hearing which was scheduled for 27 October 2009. This directions hearing was adjourned at the request of the parties who advised they were finalising terms. A further directions hearing listed for 10 November 2009 was adjourned because *'There was an error made in a handwritten amendment to the terms, requiring the terms to be re-executed. This is the reason for the delay'*.[1] The directions hearing was adjourned 19 November 2009 when the proceeding was struck out by Senior Member Walker:

> There being no appearance by or on behalf of the parties and the proceeding appears to have settled, the proceeding is struck out.

7 A copy of these orders were sent to the parties on 25 November 2009. On 3 December 2009 NOH wrote to the tribunal advising the proceeding had not resolved, and requesting it be listed for a further directions hearing, and indicating the builder would be making an application for costs at the directions hearing. This letter was treated as an application for reinstatement and a reinstatement hearing listed for 19 February 2010.

8 Although the parties were given notice of the reinstatement hearing by facsimile on 21 December 2009 no material was filed by the parties prior to the hearing. At the commencement of the reinstatement hearing the owners filed an affidavit by their solicitor Demetra Giannakopolulos, dated 16 February 2010, in which she deposed to the circumstances and communications following the sending of the signed Terms to NOH on 29 October 2009 - the date for completion of the works specified in clause 1(a) having been extended by agreement on 15 October 2009.

9 Clause 1(a) required the builder to obtain a certificate of compliance from the local council by 4 December 2009. This was obtained on or about 21 December 2009.

10 Clause 1(c) required the builder to supply the owners with the invoices or warranty cards for the appliances. Ms Giannakopolous exhibits to her affidavit copies of correspondence concerning the failure of the builder to

[1] Facsimile from RK of 10 November 2009 enclosing email from NOH consenting to the adjournment.

provide warranty cards or invoices for all of the appliances although a number of invoices have been provided.

11 The reinstatement hearing was adjourned to 16 March 2010 so that the builder could file and serve affidavit material in reply, with the owners being given an opportunity to file and serve further affidavit material in reply. This hearing was subsequently adjourned to 18 March 2010 because of my unavailability on 16 March.

12 On 3 March 2010 the builder filed an affidavit of its solicitor Omar Peter El-Hissi in which he acknowledges that the bundles of invoices sent to RK on 2 November 2009 did not include the invoices for the garage doors and the hot water service. He states the invoice for the garage doors was subsequently provided to RK on 2 February 2010, and the invoices for the range-hood and stove top on 3 March 2010. The invoices for the hot water services have not been provided. In paragraph 24 of his affidavit Mr El-Hissi states that the hot water services are Bosch 26e units. Further he states he rang Bosch who advised that the warranty for the hot water services is 3 years and 10 years for the heat exchanger, and that the warranty will be recognised if Bosch was advised of the manufacturing code. He also states that the '*invoice for the hot water service is of no value to the respondents*'. Surprisingly, there is no affidavit material from a director or officer of the builder explaining its inability to provide a copy of the invoice, nor is there any direct evidence from a representative from Bosch.

13 In paragraph 27 he confirms the builder seeks to have the proceeding reinstated and that it be set down for a contested hearing because of the delays caused by the owners in agreeing to settlement and subsequently retracting their agreement; the failure of the owners to comply with the terms, when the builder has complied, with the exception of providing the invoice for the hot water services; and the builder's loss of faith in the settlement process.

14 On 15 March 2010 the owners filed a further affidavit of Ms Giannakopoulos dated 16 February 2010 in which she deposes to the chain of correspondence passing between RK and NOH since the directions hearing on 8 October 2009. A further affidavit in reply by Ms Giannakopoulos dated 9 March 2010 and affidavits by each of the owners were also filed.

15 In his affidavit Amjad Al-Khatib responds to many of the statements made by Mr El-Hissi in his affidavit of 10 March 2010. In particular he states that the hot water units are Dux; not Bosch as deposed to by Mr El-Hissi. In her affidavit Jamileh Muti also responds to many of Mr El-Hissi's statements but also sets out various repair costs incurred by the owners before the compulsory conference.

16 Mr El-Hissi has affirmed a further affidavit of 17 March 2010 exhibiting further correspondence with RK including a letter to RK dated 17 March

2010 enclosing the Plumbing Compliance Certificates for each unit, and a copy of a letter from RK dated 11 February 2010 marked 'Without prejudice save as to costs', which I will consider later.

Execution of the Terms

17 As noted above, the owners signed the Terms on 8 October 2009. When the directions hearing was stood down, counsel for the builder obtained instructions that a director of the builder would also sign them. Despite repeated enquiries by the owner's solicitors they did not received a copy of the Terms signed by the builder. On 20 October 2009 the owners agreed that the date for completion of the works in clauses 1(a) and (b) be amended from 9 November to 4 December 2009. On 21 October 2009 NOH advised RK that his client would arrange for the Terms to be executed with the amended date, and on 22 October 2009 that his client would have the signed terms sent to him that day.

18 On 22 October 2009 RK advised NOH they had a copy of the amended Terms signed by the owners and enquiring when he would be in a position to exchange the terms.

19 On 23 October 2009 NOH sent the following email to RK:

> We refer to previous correspondence in this matter. On the basis that you will provide our office with an identical copy of the Terms of Settlement signed by your clients by way of exchange, we enclose a copy of the Terms of Settlement duly executed by our client.
>
> We look forward to receiving a copy of the signed Terms by way of exchange.

20 The copy Terms sent under cover of that email included 4 December 2009 as the amended date in clause 1. Upon receipt RK emailed NOH requesting that the builder initial the amendments to clause 1 – a further copy including the initialled amendments were sent by NOH to RK on 25 October 2009.

21 Although not a party to these proceedings, Edina Constructions Pty Ltd is a party to the Terms for reasons which it is not necessary to consider in the context of this application.

22 On 26 October 2009 RK emailed NOH advising:

> Mr Alomari appears to have signed the terms on behalf of Edina Constructions Pty Ltd. However he not a director of Edina Constructions Pty Ltd. Please provide written confirmation of his authority to sign on behalf of Edina Constructions.
>
> Further the amended 1(a) and (b) is initialled "O B I A" as well – is this Mr Ibrain Ametovski [of Edina]?
>
> Once the confirmations are provided we will exchange our clients' signed and initialled terms of settlement.

23 On 28 October 2009 NOH emailed signed and initialled Terms to RK – it seems that RK did not notice that the date in clause 1 had been amended to 14 December 2009. On 29 October 2009 at 10:41AM a copy of the amended Terms with the date 4 December 2009 in clause 1 signed by the owners was emailed to NOH. At 4:03PM on the same day RK emailed NOH:

> Your client unilaterally changed the date in paragraph 1(a) and (b) to "14 December". This is not the agreed date. The date is 4 December 2009. Please ensure that the original terms to be sent reflect the date of "4 December" and are initialled by the correct parties. Please send a copy by fax showing the correct date of "4 December".

24 On 2 December 2009 NOH replied:

> I am away at the moment. I believe this is simply our client's unintentional mistake. Our client is well aware that the relevant date is 4 December. Once I get the resigned terms I will send over.

25 Despite numerous requests from the owners' lawyers, amended Terms with the correct date signed by the builder are still to be provided to them.

The builder's position

26 The builder contends the proceeding should be reinstated, and orders made for a final hearing including the filing of a defence and counterclaim by the owners. The builder contends that as signed Terms have not been exchanged there is no settlement. Alternatively, if there is a settlement that the owners have repudiated the Terms and they should be set aside.

27 It was not until the second reinstatement hearing on 18 March 2010 that there was any suggestion on behalf of the builder that there was no agreement because there had been no exchange of signed amended Terms with the correct date, or alternatively that the owners had repudiated the Terms. These submissions were made without notice to the owners. Being mindful of the tribunal's obligations under ss97 and 98 of the *Victorian Civil and Administrative Tribunal Act* 1998 I adjourned that hearing to 28 April 2010 to give the owners an opportunity to respond.

The owners' position

28 The owners contend there is a concluded agreement as evidenced by the exchange of signed Terms in October 2009. Although they are yet to receive an identical counterpart signed on behalf of the builder, that this is effectively a formality because its solicitor acknowledged that the amended date of 14 December 2009 was an inadvertent mistake on the part of the builder, and that 4 December 2009 was the correct date in clause 1(a) of the Terms. They oppose the builder's application for reinstatement because they say it is in default of its obligations under the Terms in failing to provide the invoice for the hot water services.

29 At the third reinstatement hearing on 28 April 2010 when Dr Sharpe of Counsel appeared on behalf of the owners she submitted that in the alternative the builder was estopped from relying on any technicality to avoid the Terms because it had induced the owners to believe a settlement had been reached. Further the builder has substantially, although not completely, complied with its obligations under the Terms consistent with an implied consent to the amended Terms with 4 December 2009 as the amended date for completion of the items in paragraphs 1 (a) and (b).

Discussion

30 This is a most unfortunate situation where at various times the parties have seemingly been reluctant to commit to a final settlement of their differences, and where since December 2009 they have become embroiled in a costly legal process about whether this proceeding should be reinstated. Numerous affidavits have been filed which, with exhibits, overfill a lever arch folder. Much of the affidavit material concerns the parties' performance of their respective obligations under the Terms prepared following the compulsory conference in August. There are numerous affidavits from the solicitors for each of the parties, and an affidavit from each of the owners. Surprisingly, there are no affidavits from a director of the builder – no explanation has been provided for this.

31 The legal advisors for both parties agree that an agreement in principle was reached at the compulsory conference in August 2009. Terms were prepared by the builder's solicitor but were not signed by the owners until 8 October 2009 seemingly because of their concerns about the builder's ability to comply with its obligations. This is a curious approach because the Terms contain default provisions. If the builder fails to comply with its obligations the owners are not required to pay the settlement sum of $57,000 and are at liberty to apply to have the proceeding reinstated and obtain orders from the tribunal for:

i the delivery of the warranty certificates or invoices for the appliances;

ii an order that the builder pay them the cost of completion of the items set out in clauses 1(a) and (b);

iii any other orders the tribunal considers necessary to give effect to clause 1; and

iv an order that the builder pay the owners' costs of obtaining such orders on County Court Scale 'D'.

32 If the owners fail to comply with their obligations the builder is entitled to reinstate the proceeding and obtain judgement for the settlement sum plus costs of obtaining judgement on County Court Scale 'D'.

33 Much is made by counsel for the builder to the continual reference in correspondence from RK about terms still not having been exchanged, or alleged terms, as confirmation that until signed Terms have been exchanged

there is no settlement. This is despite substantial performance by the builder of its obligations under the Terms except, as I understand it, providing the owners with the invoices for the hot water units.

34 However, here I am concerned with the parties' intentions. The owners' lawyers have been understandably careful and cautious to ensure that the Terms are properly executed. Despite persistent accusations on behalf of the builder that the owners are unwilling to settle and comply with their obligations under the Terms, it seems to me that the builder is seeking to rely on a technicality to resile from the agreement because of its inability to perform its obligations in their entirety.

35 It is irrelevant whether the warranty cards were left in the premises when the appliances were installed, or whether the warranty periods have expired, or whether the owners might be able to obtain the benefit of the warranty for the hot water units without an invoice or a warranty card (although there is no evidence about this for the Dux Hot Water Units) – the builder entered into a contract to provide warranty cards or invoices for all of the items specified in clause 1(c). Further, it agreed that if it was unable to provide them the owners could apply to the tribunal for an order that the builder deliver such warranty cards and invoices to them.

36 Whilst the owners might have been slow in signing the Terms, they signed them on 8 October 2009. The builder did not sign the amended Terms with the correct date in clause 1 (a) and (b) – 4 December 2009 - until on or about 22 October 2009. But for the mistake by the builder and the director of Edina Constructions signing in the wrong place, and their failure to initial the amendments, the exchange could have been completed then. A copy of the amended Terms with the correct date, signed by the owners, was sent to the builder's lawyers on 29 October 2009.

37 Although there was some correspondence between the parties as to the amended date for completion of the items in paragraphs 1(a) and (b) I am not persuaded the date was a fundamental term of the contract.

38 The completion by the builder of the items set out in clause 1(a) and (b) of the Terms confirms that it considered itself bound by the Terms. It is only since the owners have been insisting on their contractual rights, that warranty cards or invoices for all appliances be provided to them, that the builder seems to have been looking for ways to avoid the contract.

39 At the first reinstatement hearing on 16 February 2010 the builder's primary concern was the failure of the owners to pay the settlement sum. That hearing was adjourned, with costs of the day, to give the builder an opportunity of responding to the allegations set out in Ms Giannakopolous' affidavit of 16 February 2010.

Have the owners repudiated the Terms?

40 Alternatively, the builder contends the owners repudiated the Terms when the builder allegedly experienced some difficulties gaining access to carry

out the completion works (which is denied by the owners), and by Ms Muti seemingly foreshadowing, in her affidavit of 11 March 2010, a claim for repair costs incurred prior to the compulsory conference and, by the owners making a further settlement offer on 11 February 2010.

41 Without hearing from the parties, and in particular from a representative from the builder it is premature to make any findings about access.

42 Although Ms Muti has set out certain expenses in her affidavit, until a claim is actually made this cannot be regarded as a repudiation of the Terms.

43 On 11 February 2010 the owners made a 'Without Prejudice' offer to settle the proceedings. A copy of this offer has been exhibited to Mr El-Hissi's affidavit of 17 March 2010 although it is clearly marked 'Without Prejudice save as to costs'. The owners have not waived privilege and object to it having been filed. It is inappropriate that it remain on the tribunal file and I will direct the principal registrar to remove and return it.

44 I do not consider the making of a further offer of settlement to be repudiatory. By the time this offer was made the owners (and no doubt the builder) had incurred significant additional legal costs. It is not unusual, where terms of settlement are entered into, and a proceeding is subsequently reinstated or an application for reinstatement foreshadowed, for parties to engage in further discussions with a view to minimising the legal costs associated with a reinstated proceeding.

Conclusion

45 Where parties negotiate a settlement and sign terms of settlement it is not unreasonable to expect there are no known impediments at the time of signing the terms to a party performing its obligations. That does not appear to have been the case here. The builder has not been able to provide the owners with warranty card or invoices for all of the appliances and it seems unlikely that it would ever have been unable to do so. Accepting the veracity of the matters set out in the various affidavits made by the builder's solicitor it seems the builder considers the owners unreasonable in their demands that it provide all of the warranty cards or invoices. Yet, the builder agreed to do so, and in default for the owners to apply to the tribunal for these to be delivered to them. It matters not whether the builder now says it left the warranty cards in the units when the appliances were installed.

46 The in principle agreement to settle was reached at a compulsory conference in August 2009, nearly 8 months after the owners took possession of the units. The Terms were prepared by the builder's solicitor presumably on instructions from the builder and first signed by the builder around the 21 or 22 October 2009. If the builder did not believe the warranty cards were important and that the warranty periods had expired it should not have agreed to provide them or alternatively the invoices.

47 Counsel for the builder submitted that as the warranties for each of the appliances has now expired the warranty cards or invoices have no value, and the builder has provided full consideration under the Terms.

48 Under the terms a party can apply to the tribunal for the proceeding to be reinstated where the other party is in default. Strictly, the builder's application must fail because it is in default. The owners oppose any order for the proceeding to be reinstated because of the builder's default. However, in my view, simply dismissing the builder's application would not assist in the final resolution of the disputes between the parties. Further, whilst not condoning the builder's failure to comply with its obligations under the Terms allowing the owners to retain the full settlement sum when there has been substantial performance by the builder of those obligations would be unfair with a strong likelihood of the owners being unjustly enriched.

49 Having regards to ss97 and 98 of the VCAT Act and being mindful of the tribunal's powers under s53 of the *Domestic Building Contracts Act* 1995 I consider it appropriate to reinstate the proceeding and order the owners to pay the settlement sum into the Domestic Builders Fund pending determination of the appropriate orders to be made accepting the builder is unable to provide the outstanding warranty cards and invoices.

50 At the third reinstatement hearing, counsel for the owners submitted that in the circumstances it would be appropriate for the tribunal to make an order under s93 of the VCAT Act [to give effect to the settlement agreed by the parties] by ordering damages in favour of the owners for the builder's failure to provide all warranties and/or invoices, with such amount to be deducted from the settlement sum. She submitted that the repair costs set out in Ms Muti's affidavit were indicative of the value of the warranties. However, that is a matter for another day.

51 As it was anticipated by the Terms that the settlement sum would be paid within 30 days of the builder complying with its obligations set out in paragraph 1. Accordingly I will order that the settlement sum be paid into the Domestic Builders Fund within 30 days of the date of these orders.

52 As I have seen the owners' without prejudice offer of 11 February 2010 I will order that the determination of the appropriate orders to be made for the failure of the builder to provide all of the warranty cards or invoices be heard by another member. I will reserve the question of costs with liberty to apply although I draw the parties' attention to s109 of the VCAT Act.

DEPUTY PRESIDENT C. AIRD